

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On November 28, 2008 appellant, then a 53-year-old parcel sorting machine (PSM) clerk, filed a traumatic injury claim (Form CA-1) alleging a left ankle injury in the performance of duty. He stopped work on December 2, 2008. OWCP accepted appellant's claim for an ankle sprain on April 13, 2009. It paid him compensation for temporary total disability on the periodic rolls beginning October 25, 2009. OWCP determined that appellant's weekly pay rate was \$1,010.12 based on the rate of pay on the date disability began on December 2, 2008.

In a letter dated June 24, 2011, OWCP advised appellant of his receipt of compensation on the periodic rolls and his responsibility to return to work in connection with the accepted injury. In an attached Form EN-1049, OWCP stated:

“To minimize the possibility of an overpayment of compensation, NOTIFY THIS OFFICE IMMEDIATELY WHEN YOU GO BACK TO WORK. Each payment shows the period for which payment is made. If you have worked for any portion of this period, return the payment to this office, even if you have already advised OWCP that you are working.”

The record reflects that appellant received compensation by direct deposit payments.

On December 11, 2012 OWCP notified appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$23,806.65 because he returned to full-time work on March 13, 2012, but was paid total disability compensation through October 20, 2012.<sup>2</sup> It found that he was at fault in creating the overpayment because he knew or should have known that the payments he received were incorrect as he was not entitled to receive compensation payments after returning to work. OWCP informed appellant that he could, within 30 days, submit evidence or argument to OWCP or request a prerecoupment hearing with the Branch of Hearings and Review.

Appellant requested a prerecoupment hearing on January 5, 2013. He requested waiver of the overpayment, stating that he never knew the payments were still going to his account, because he informed OWCP that he returned to work in March 2012.

On January 8, 2013 appellant completed and returned the Form OWCP-20 outlining his monthly income and assets as well as his household expenses and debts, including credit card and checking accounts.

The recoupment hearing was held on April 16, 2013. At the hearing, appellant argued that he was unaware that payments continued to be deposited into his bank account until October 2012 because he did not check it often. He testified that his household income was approximately \$3,496.00 per month, including \$2,600.00 in wages and \$896.00 in child support

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<sup>2</sup> OWCP calculated the amount of overpayment by adding the following payments: March 11 to April 7, 2012, \$3,002.64 (\$2,788.17 of which constituted an overpayment); April 8 to May 5, 2012, \$3,002.64; May 6 to June 2, 2012, \$3,002.64; June 3 to 30, 2012, \$3,002.64; July 1 to 28, 2012, \$3,002.64; July 29 to August 25, 2012, \$3,002.64; August 26 to September 22, 2012, \$3,002.64; and September 23 to October 20, 2012, \$3,002.64.

payments. Appellant noted that he had monthly expenses of \$1,200.00 per month on rent or mortgage payments, \$680.00 on food, \$150.00 on clothing, \$575.00 on utilities, \$300.00 on personal necessities, \$350.00 for a car payment, \$100.00 for a Chase credit card and \$125.00 for a Visa credit card. He stated that he had \$3,500.00 in a savings account and \$7,000.00 in a checking account.

In a decision dated July 15, 2013, the hearing representative finalized the overpayment of \$23,806.65. He also found that appellant was at fault in creating the overpayment of compensation in the amount of \$23,806.65 for the period March 13 through October 20, 2012. The hearing representative stated that appellant could not be found without fault because he had received numerous forms advising him of his responsibility to report earnings from employment to OWCP and because the nature of workers' compensation as an income replacement system was sufficient to put him on notice that he was not entitled to both benefits and wages. As appellant was at fault, recovery of the overpayment could not be waived. The hearing representative noted that appellant had approximately \$2,131.66 of income over expenses and, based on the evidence regarding his income and expenses, he was able to afford monthly payments of \$1,000.00 to recover the overpayment.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>3</sup> FECA, however, also places limitations on an employee's right to receive compensation benefits. Section 8116 provides that, while an employee is receiving benefits, he or she may not receive salary, pay or remuneration of any type from the United States, except in limited circumstances.<sup>4</sup> OWCP's regulations further state that compensation for wage loss due to disability is available only for the period where an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.<sup>5</sup> A claimant is not entitled to receive temporary total disability and actual earnings for the same period.<sup>6</sup> OWCP's procedures provide that an overpayment in compensation is created when a claimant returns to work and has earnings but continues to receive wage-loss compensation.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$23,806.65 from March 13 through October 20, 2012. The record establishes that he received an overpayment during the period in question because he

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<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> *Id.* at § 8116(a).

<sup>5</sup> 20 C.F.R. § 10.500(a).

<sup>6</sup> *See Daniel Renard*, 51 ECAB 466, 469 (2000).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2(a) (September 2010); *see L.S.*, 59 ECAB 350, 353-4 (2008).

received monthly payments for temporary total disability compensation after returning to full-time work. OWCP calculated the \$23,806.65 overpayment by totaling the amount from eight compensation checks appellant received during the period March 13 through October 20, 2012, at the monthly rate of \$3,002.64, including one check covering the period March 11 through April 7, 2012 for which he was overpaid by \$2,788.17. For checks during the period April 8 through October 20, 2012, appellant was overpaid in the amount of \$3,002.64 per month. Seven payments of \$3,002.64 added to the \$2,788.17 partial overpayment equals the overpayment of \$23,806.65. Appellant did not contest the amount or period of the overpayment. The Board finds that OWCP properly determined that he received an overpayment of compensation in the amount of \$23,806.65 for the period March 13 through October 20, 2012.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of FECA provides that adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.<sup>8</sup> No waiver of an overpayment is possible if the claimant is at fault in creating the overpayment.<sup>9</sup>

On the issue of fault, 20 C.F.R. § 10.433(a) provides that an individual is with fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.<sup>10</sup>

With respect to whether an individual is without fault, section 10.433(b) of OWCP's regulations provide that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

OWCP applied the standard in determining that appellant was at fault in creating the overpayment. For it to establish that he was at fault in creating the overpayment of compensation, it must establish that, at the time he accepted the compensation payments in question, he knew or should have known that the payments were incorrect.<sup>12</sup>

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<sup>8</sup> 5 U.S.C. § 8129(b).

<sup>9</sup> *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

<sup>10</sup> 20 C.F.R. § 10.433(a). *See Kenneth E. Rush*, 51 ECAB 116, 118 (1999).

<sup>11</sup> *Id.* at § 10.433(b).

<sup>12</sup> *See Claude T. Green*, 42 ECAB 174, 278 (1990).

Appellant's receipt of the April 7, 2012 direct deposit in the amount of \$3,002.64 covered a portion of the first overpayment from March 13 through April 7, 2012.<sup>13</sup> The Board has found a claimant to be at fault in cases where he or she received compensation checks through direct deposit which involve a series of payments over several months with clear knowledge that the payments were incorrect.<sup>14</sup> It is not appropriate, however, to make a finding that a claimant has accepted an overpayment by direct deposit until such time as a reasonable person would have been aware that this overpayment had occurred. This awareness could be established either through documentation such as a bank statement, notification from OWCP or where a reasonable period of time has passed during which a claimant could have reviewed independent confirmation of the incorrect payment.<sup>15</sup> Appellant had no reason to suspect at the time that the April 7, 2012 payment of \$3,002.64, \$2,788.17 of which was an overpayment, was deposited into his bank account that OWCP had issued an incorrect payment.<sup>16</sup> Because the funds were deposited directly into his bank account, he was not in a position to immediately decline acceptance of the amount paid by OWCP. The Board finds that appellant was not at fault in creating the overpayment of \$2,788.17 for the period March 13 through April 7, 2012. A finding of no fault does not mean, however, that the claimant may keep the money, only that OWCP must consider his or her eligibility for waiver for this period. The case will be remanded for it to obtain current financial information regarding income and expenses and determine whether the claimant is entitled to waiver. After such further development as OWCP may find necessary, it should issue an appropriate decision on the issue of whether the overpayment should be waived for the relevant portion of the April 7, 2012 direct deposit.

After appellant's receipt of the first incorrect direct deposit after returning to work, he knew or should have known that the amount of compensation in subsequent direct deposit checks were incorrect based on his receipt of full salary. For receipt of the seven direct deposit payments from April 8 through October 20, 2012 totaling \$21,018.48, the Board finds that he was with fault as he knew or should have known that he accepted incorrect payments.

### **LEGAL PRECEDENT -- ISSUE 3**

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA. Section 10.441(b) of the regulations provide:

“When an overpayment has been made to an individual who is not entitled to further payments, the individual shall refund to [OWCP] the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. The overpayment is subject to the provisions of the Federal Claims

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<sup>13</sup> The deposit covered the period March 11 through April 7, 2012.

<sup>14</sup> See *Karen K. Dixon*, 56 ECAB 145, 149 (2004).

<sup>15</sup> See *K.H.*, Docket No. 06-191 (issued October 30, 2006).

<sup>16</sup> See *Tammy Craven*, 57 ECAB 689, 692 (2006).

Collection Act of 1966 (as amended) and may be reported to the Internal Revenue Service as income.”<sup>17</sup>

### **ANALYSIS -- ISSUE 3**

The Board lacks jurisdiction to determine the method of payment for the purpose of the recovery of a finalized overpayment. Section 10.441(b) provides OWCP discretion to determine the method of recovery of an overpayment when the overpayment has been made to an individual who is not entitled to further payments. The Board does not have jurisdiction over the recovery appellant is required to pay as he has no further entitlement to compensation. Appellant is not in receipt of continuing compensation benefits.<sup>18</sup>

On appeal, appellant contends that OWCP relied on incorrect or outdated figures to determine his net monthly income. As noted the Board lacks jurisdiction to determine the method of recovery of a finalized overpayment when a claimant is not entitled to continuing wage-loss compensation.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$23,806.65. The Board finds that OWCP properly found him at fault in creating the overpayment for the period April 8 through October 20, 2012, but that it improperly found him at fault in creating the overpayment that occurred from March 13 through April 7, 2012. The Board lacks jurisdiction over the issue of recovery of the overpayment.

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<sup>17</sup> 20 C.F.R. § 10.441(b).

<sup>18</sup> *Robert N. Vachon*, 36 ECAB 502, 503 (1985); *Marshall L. West*, 36 ECAB 490, 492 (1985).

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 15, 2013 decision of the Office of Workers' Compensation Programs is affirmed as to the fact and amount of overpayment. The decision is set aside and remanded for further development on the issue of waiver.

Issued: June 3, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board